

**Arizona Directors Institute:
25 Years of Excellence**

Arizona Department of Education

Bullying and Students With Disabilities

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I. Introduction

This outline provides an overview of federal and Arizona law and judicial interpretations addressing the issue of bullying of students with disabilities.

Bullying of children with disabilities is significant but there is little research addressing the issue. Only 10 U.S. studies have been conducted on the connection between bullying and developmental disabilities but all of these studies found that **children with disabilities were two to three times more likely** to be bullied than their nondisabled peers. One study shows that 60 percent of students with disabilities report being bullied regularly compared with 25 percent of all students. National Bullying Prevention Center (2013)

II. Definitions

A. Bullying Under Federal Law

1. There is no federal law specifically addressing bullying and therefore there is no legal definition of bullying under federal law.
2. The United States Department of Education recently issued a memorandum to the field addressing bullying of students with disabilities. In the memo, the Department defined it as:

Bullying is characterized by aggression used
within a relationship where the aggressor(s)

has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g., cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles.

Dear Colleague Letter 61 IDELR 263 (United States Department of Education, Offices of Special Education and Rehabilitative Services and the Office of Special Education Programs (2013))

3. The bully-victim relationship is characterized by a real or perceived imbalance of power and encompasses a variety of negative acts that are carried out repeatedly over time. Nels Ericson, U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention Fact Sheet, Addressing the Problem of Juvenile Bullying (2001). Negative actions can broadly be described as inflicting or attempting to inflict discomfort upon another. Bullying takes three forms: physical (e.g. hitting); verbal (e.g. taunting); and psychological (e.g. engaging in social exclusion). Indirect, psychological bullying, in the form of exclusion and isolation is often less visible, but not less corrosive.
T.K. v. New York City Department of Education 56 IDELR 228 (United States District Court, Eastern District, New York (2011))
4. Bullying is unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance. The behavior is repeated, or has the potential to be repeated, over time. Both kids who are bullied and who bully others may have serious, lasting problems. In order to be considered bullying, the behavior must be aggressive and include:

- An Imbalance of Power: Kids who bully use their power—such as physical strength, access to embarrassing information, or popularity—to control or harm others. Power imbalances can change over time and in different situations, even if they involve the same people.
- Repetition: Bullying behaviors happen more than once or have the potential to happen more than once.

Bullying includes actions such as making threats, spreading rumors, attacking someone physically or verbally, and excluding someone from a group on purpose. Stopbullying.gov (United States Department of Health and Human Services (2012)).

B. Arizona Law (ARS 15-341(A)(37))

1. Each governing board must establish a policy which includes definitions of harassment, intimidation and bullying

C. Harassment Under Federal Law

1. The United States Department of Education issued a Memorandum to all states in 2000 addressing the issue of harassment based on disability. The Memo defines disability harassment as:

intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program.

Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating.

The Memo makes clear that disability harassment may result in a denial of FAPE under Section 504, Title II of the Americans with Disabilities Act and the Individuals With Disabilities Education Act (IDEA). Parents may initiate administrative due process procedures under IDEA, Section 504, or Title II to address a denial of FAPE, including a denial that results from disability harassment.

Regarding the IDEA, the Memo specifically states that:

Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the IDEA, as well as Section 504 and Title II. The IDEA was enacted to ensure that recipients of IDEA funds make available to students with disabilities the appropriate special education and related services that enable them to access and benefit from public education. The specific services to be provided a student with a disability are set forth in the student's individualized education program (IEP), which is developed by a team that includes the student's parents, teachers and, where appropriate, the student. Harassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE. (emphasis added)

Memorandum from the United States Department of Education
111 LRP 45106 (United States Department of Education, Office of Special Education and Rehabilitative Services and the Office for Civil Rights (2000)).

2. The Office for Civil Rights (OCR) issued a subsequent letter to all states regarding the relationship between bullying and harassment.

Specifically, OCR stated:

In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools' appreciation of their important responsibility to maintain a safe learning environment for all students. I am writing to remind you, however, that some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the

federal antidiscrimination laws enforced by the Department's Office for Civil Rights (OCR). As discussed in more detail below, by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment. (emphasis added)

In this memo, OCR stated that when responding to incidents of misconduct, schools should keep in mind the following:

- **The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond.** Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.
- When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A “school's responsibility is to eliminate the hostile environment created by the harassment”, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.

Dear Colleague Letter 55 IDELR 174 (United States Department of Education, Office for Civil Rights (2010)).

III. Complaint Options and Procedures/Standards/Remedies Under the IDEA, Section 504

A. Individuals With Disabilities Education Act (IDEA)

1. Dispute Resolution Options

- a. Mediation
- b. State Administrative Complaints
- c. Due Process Hearings (filed within 1 year)
- d. Appeal to State or Federal Court

2. Standard

- a. Free Appropriate Public Education (FAPE)
- b. In determining whether a FAPE is provided is twofold:
 - (1) Have the procedures set forth in the IDEA been adequately complied with?
 - (2) Is the IEP reasonably calculated to enable the child to receive educational benefits?

Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. 102 S. Ct. 3034, 553 IDELR 656 (United States Supreme Court (1982))

3. Possible Remedies

- a. State Administrative Complaint Corrective Action Plans
 - (1) Ordering the IEP Team to reconvene
 - (2) Staff Training
 - (3) Policy Revisions
 - (4) Compensatory Education
 - (5) Monetary Reimbursement for Services
 - (6) No Monetary Damages
- b. Due Process Hearings/Judicial Appeals
 - (1) IEP Revisions
 - (2) Reimbursement for Unilateral Placements/Services
 - (3) Attorney Fees for prevailing party status

(4) No Monetary Damages

B. Section 504

1. Dispute Resolution Options

- a. Local Grievance Procedures
- b. Due Process Hearings
- c. Complaints filed with the United States Department of Education, Office for Civil Rights (within 180 days)
- d. Judicial Actions

2. Standard

- a. Discrimination based on disability
- b. OCR has held that a single incident of harassment could violate Section 504. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces. Dear Colleague Letter 55 IDELR 174 (United States Department of Education, Office for Civil Rights (2010)).

3. Possible Remedies

- a. Local Grievance/OCR
 - (1) Corrective Actions
- b. Judicial Actions
 - (1) Monetary Damages for intentional discrimination /deliberate indifference
 - (a) Schools may be liable for peer sexual harassment if it deliberately fails to stop pervasive harassment. The conduct must be so severe, pervasive and objectively offensive that the student is precluded

from benefiting from a public education before liability is imposed. The Court noted in the decision that in a school setting, students often engage in insults, teasing, shoving, and gender-specific conduct that is upsetting to the student subjected to it. “Damages are not available for simple acts of teasing and mere name-calling among school children even where those comments target differences in gender.”

In addition, the Court stated although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity, it was unlikely that Congress would have thought such behavior sufficient to rise to this level of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, the Court attempted to reconcile the general principle that prohibits a school official’s indifference to known peer harassment with the practical realities of responding to student behavior. Davis v. Monroe, (United States Supreme Court (1999)). Note: Although this case addressed peer harassment based on gender prohibited by Title IX, the Courts have applied this liability standard to other forms of peer harassment.

- (b) A student with a disability alleged he was harassed and bullied by his peers and sued the school under Section 504. The Court held the following elements must be shown before a school can be held liable for peer harassment based on disability: (1) the student is a student with a disability; (2) the he/she was harassed based on their disability; (3) that the harassment was sufficiently severe or pervasive that it altered his/her education or created an abusive/hostile environment; (4) that the school knew of the harassment; and (5) that the school was deliberately indifferent to the harassment incidents. In this case, the school investigated the matter, disciplined the students involved, monitored the

student with a disability and separated him from his harassers, held mediation sessions, contacted the parents and provided training to the student body. The affirmative steps taken by the school was clear evidence that it was not deliberately indifferent. S.S. v. Eastern Kentucky University 532 F. 3d. 445, 50 IDELR 91 (United States Court of Appeals, 6th Circuit (2008)).

- (c) To prevail on a Section 504 claim for damages, the plaintiffs must prove "intentional discrimination" which may be proven by showing "deliberate indifference". Deliberate indifference is "knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood" Mark H. v. Lemahieu 513 F.3d 922 (United States Court of Appeals, 9th Circuit (2008)).

- (2) Injunctive Relief

- (3) Attorney Fees for prevailing party status

IV. Bullying and Harassment Under the IDEA FAPE Analysis

A. FAPE Analysis Standard and the IEP Team

Whether or not the bullying is related to the student's disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied. States and school districts have a responsibility under the IDEA, 20 U.S.C. Section 1400, et seq., to ensure that FAPE in the least restrictive environment (LRE) is made available to eligible students with disabilities. In order for a student to receive FAPE, the student's individualized education program (IEP) must be reasonably calculated to provide meaningful educational benefit.

Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or her IEP.

In carrying out the responsibility to ensure FAPE to a student with a disability who is a victim of bullying, the IEP Team needs to meet to determine the impact of the bullying on the student's ability to receive educational benefit under their IEP. Note that it is the IEP Team ensuring meaningful parent participation, not the school official(s) who are investigating the bullying incident(s) under the schools

bullying policy, who should address the impact on the student. Participation on the Team by the staff who investigated the incident(s) should be considered.

The IEP Team should be convened when a student on an IEP has been the target of bullying and address the following issues:

1. The Team needs to answer the question of whether the bullying has impacted the student's ability to receive "meaningful educational benefit" under their IEP based on a review of existing information.

Note: It is important that the school members of the Team focus on the needs of the student who has been the target of bullying and not disclose confidential information regarding the other student(s) involved in the bullying behavior.

2. If existing data or information does not provide sufficient information to determine the impact of bullying on the student's receipt of FAPE, the Team needs to determine what additional assessments are required in order to ascertain the impact of bullying on the student's receipt of special education and related services. The IDEA then requires the school to provide the parent with prior written notice of the proposed evaluation and request for consent for such evaluation.
3. If the IEP Team determines that the bullying has impacted the student's receipt of FAPE, the Team then needs to address what additional or different special education and/or related services need to be included in the IEP.
4. The IEP Team may need to consider whether the student's current educational placement or location of services are still appropriate. OSEP has stated that although "it may be appropriate to consider whether to change the placement of the child who was the target of bullying behavior, placement teams should be aware that certain changes to the educational program of a student with a disability (e.g., placement in a more restrictive "protected" setting to avoid bullying behavior) may constitute denial of the IDEA's requirement that the school provide FAPE in the LRE".
5. If changes to the IEP are made, IDEA procedures require that the parent receive prior written notice of the proposed changes in the provision of FAPE or educational placement. Prior written notice must be provided to the parent even if the parent participated in the Team meeting. Letter to Lieberman 52 IDELR 18 (United States Department of Education, Office of Special Education Programs (2008)).
In addition, a copy of the revised IEP must be provided to the parent. (34 C.F.R. Section 300.322(f))

6. School staff impacted by the changes must also be informed of their “specific responsibilities” in implementing the IEP as amended. (34 C.F.R. Section 300.323(d)(2))

Dear Colleague Letter 61 IDELR 263 (United States Department of Education, Offices of Special Education and Rehabilitative Services and the Office of Special Education Programs (2013))

Lesson Learned:

Compliance with Arizona’s law and/or your school district’s bullying policy does not fulfill the school district’s obligation to ensure that the student with a disability who is a target of bullying is receiving a FAPE under their IEP. The IEP Team must be convened to address what, if any, changes to the IEP are warranted.

B. Educational Impact of Bullying

1. In one of the frequently cited judicial cases where bullying was addressed as an IDEA FAPE issue, the Court established the standard to be applied in such an analysis.

In this case, the Court refused to grant the school district’s Motion for Summary Judgment regarding the alleged denial of FAPE based on bullying. A student with a specific learning disability alleged that she was bullied in school. The parents met with the principal to discuss their concern about bullying but were told to leave the principal’s office. Afterwards, the parents brought up the issue at the IEP meeting but again were told by the principal that it was not an appropriate topic for the IEP Team.

Both the hearing officer and the state review officer concluded that the student’s IEP was reasonably calculated to enable the student to receive educational benefits.

The Court found that neither the hearing officer nor state review officer properly considered the relationship of the bullying allegation to the provision of FAPE.

The Court stated:

The rule to be applied is as follows: When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If

harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

It is not necessary to show that the bullying prevented all opportunity for an appropriate education, but only that it is likely to affect the opportunity of the student for an appropriate education. The bullying need not be a reaction to or related to a particular disability. (emphasis added)

T.K. v. New York City Department of Education 56 IDELR 228 (United States District Court, Eastern District, New York (2011)). In a subsequent order, the Court remanded the case back to the hearing officer preferably the one who heard the case in the first instance to make a determination of whether the bullying deprived the student of her educational benefit and any other relevant issues bearing on this issue.

On remand, the District Court reversed the hearing officer's and state review officer's decisions and concluded the student was denied a FAPE due to being the victim of bullying.

The Court stated that "a disabled student is deprived of a FAPE when school personnel are deliberately indifferent to or fail to take reasonable steps to prevent bullying that substantially restricts" the educational opportunities of the student with disabilities. The conduct does not need to be outrageous in order to be considered a deprivation of rights of a disabled student. It must, however, be sufficiently severe, persistent, or pervasive that it creates a hostile environment. Where there is a "substantial probability that bullying will severely restrict a disabled student's educational opportunities, as a matter of law an anti-bullying program is required to be included in the IEP".

The Court concluded in this case the fact that the IEP Team refused to take bullying into account when drafting the student's IEP and behavior intervention plan denied a FAPE. When the student's parents sought to raise the bullying problem as it related to her educational needs and opportunities during the IEP Team meeting they were told that it was not an appropriate topic for the meeting. The IEP team's refusal to allow the parents to raise their legitimate concerns about bullying as it related to her

FAPE deprived them of meaningful participation in the development of her IEP.

The Court also reviewed the goals and services in the IEP and BIP and observed that “a lay parent would not have understood them as reasonably calculated to provide a FAPE” in light of the bullying that occurred. The law requires that “the substance of the IEP must be intellectually accessible to parents” so that they could make an informed decision as to its appropriateness.

Lastly, the Court found that the student’s learning opportunities were restricted by bullying which was an additional ground for finding that FAPE was denied. The student complained almost daily, withdrew emotionally, started bringing dolls to school for comfort, and was late or absent a for 46 days during the school year because she didn’t want to go to school. Although she improved academically, the Court observed that academic growth is not an “all or nothing proposition”. The Court ordered that the parents be reimbursed for their unilateral private placement as a result. T.K. v. New York City 114 LRP 32794 (United States District Court, Eastern District, New York (2014)).

2. The parents of a student with autism who committed suicide sued the school district. Numerous witnesses observed other students mistreating student in the hallways, knocking books out of his hand, telling him to "pick them up, you idiot," and kicking him when he bent down. The parents alleged that the school’s failure to intervene, investigate, correct, or train their employees to adequately protect the student from bullying and harassment was the sole or a substantial contributing cause of his decision to take his own life.

Although the Court ultimately dismissed the lawsuit, the District Court’s decision, which was affirmed by the Court of Appeals, stated that “a demonstration of physical exclusion, however, is not the sole means by which a plaintiff can demonstrate deprivation of an educational opportunity”. Instead if it can be shown that the behavior so undermined and detracted from the student’s educational experiences, that student has effectively been denied access to the school’s resources and opportunities. Long v. Murray County School District 59 IDELR 76 (United States District Court, Northern District, Georgia (2012). Affirmed by the Court of Appeals at 61 IDELR 122 United States Court of Appeals, 11th Circuit (2013)). Note: This is an unpublished decision.

3. A 9th grade student was 4' 7" tall and weighed approximately 75 pounds; and suffered from Attention Deficit Hyperactivity Disorder ("ADHD"). He alleged that he was persistently harassed and bullied by classmates and that the school employees allegedly "knew of some or all of" the mistreatment to which he was subjected, and yet "condoned, permitted

and/or acquiesced in" such mistreatment. He also alleged that the school "failed and refused to train and supervise adequately [the Board] employees in appropriate and necessary techniques and procedures for handling and caring for children with disabilities. ..." Count one of his complaint alleged that the school violated his statutory right to a FAPE under the IDEA.

The Court of Appeals overturned the District Court's dismissal of the FAPE complaint. The District Court failed to consider whether the student sufficiently alleged a violation of his statutory right to a FAPE; instead, the Court considered his right to a FAPE only to the extent that it might constitute a property interest under the Constitution protected by procedural due process. Specifically, the district court improperly found that Jeremy "voluntarily withdrew" from his high school. The allegation, reasonably construed in the student's favor, is that the student was effectively forced to withdraw.

Finally, the District Court erroneously assumed that, in order to sufficiently assert a claim, the student must have been permanently deprived of his right to a FAPE. For these reasons, The Court of Appeals vacated the dismissal of the student's claim that the school violated the student's statutory right to a FAPE, and remanded to the District Court for further consideration.

Smith v. Guilford Board of Education 226 F. Appx. 58, 48 IDELR 32 (United States Court of Appeals, 2nd Circuit (2007))

4. A student with autism experienced several incidents considered by the parties to constitute bullying/harassment involving peers. The school district reported to the parents that it would investigate. Student's complaint was substantiated, the conduct stopped and the perpetrators were disciplined. Student reported no incidents for a few months until he was threatened with physical violence on two occasions. When the student reported the incidents, school officials discussed the issue with the student and notified the parents.

An IEP meeting was held. The IEP Team decided that the student was to report instances of bullying directly to the middle school vice principal.

At another IEP meeting, the parents and student raised continuing concerns about teasing and harassment. The IEP team again concluded that reporting incidents of concern by the student was a means of developing self-advocacy skills. To facilitate the student's self-advocacy goal, the school administration was to continue investigating and monitoring the student's reports. In addition, to assist the student's reporting, a process of hand signals and notes to the teacher was added and the student was given preferential seating near the teacher and peers who were supportive.

The parents requested a due process hearing alleging FAPE was denied due to bullying. The hearing officer found that there was sufficient

evidence to conclude that the school district investigated and addressed student's and parents' reports of bullying and harassment by peers on an incident by incident basis, responding in accordance with policies and procedures that it generally applies in those circumstances. The school district's response to the parent's and student's reports was in accordance with its written anti-bullying policy and in keeping with parents' expectations that students who engaged in the conduct reported by the student and parent would be investigated and disciplined.

However, the hearing officer concluded that the inadequacy of the school's response to the escalating problems in student's peer relationships was not based on the school principal's and/or vice principal's handling of reports of bullying and harassment. Rather, the deficiency on the part of the school district lied in the minimal involvement of the IEP team and special education staff in what the evidence suggests was the student's hyper-vigilance and sensitivity to the conduct of peers.

When the school's investigations into the incidents the student reported either directly, or through their parents, resulted in the conclusion that some of the incidents were unfounded or at least misinterpreted, the escalating reports should have raised a red flag concerning the student's apparently increasing perceptions of and obsession with the level of bullying and harassment that was occurring. The IEP team should certainly have reconsidered the student's need for additional services in the form of counseling and social skills training to interrupt the cycle of the student's increasing focus on reporting incidents that the student perceived to be a problem, even when the incidents did not directly involve the student.

In short, the IEP Team's response to the increased reports of harassing and bullying conduct failed to consider whether the student's reporting activities arose from the same disability symptoms that had been noted consistently between kindergarten and 7th grade. Difficult peer relationships and inadequate social skills are core deficits associated with the student's eligibility category, yet the District's singular focus on addressing the student's reports of bullying allowed those skills and relationships to deteriorate to the point that the student now does not want to return to school.

The finding that the IEP Team failed to adequately address the student's social and peer relationship needs during the second half of the last school year leads to the conclusion that the student was denied a FAPE. Although the District focused on the student's academic success as the only indication of meaningful progress, the IDEA focus is broader. A school district's obligation to provide FAPE to an eligible student also includes assuring that behavioral, social, and emotional needs arising from a disability are addressed. The District appropriately met the student's academic needs, but failed to appropriately address the student's disability-related needs in the areas of peer relationships and social skills. The

student was awarded compensatory education in the form of counseling services and/or social skills training. Tri-Valley School District 113 LRP 36022 (Pennsylvania State Education Agency (2013))

- C. The parent of a student with autism observed children teasing her son at recess and during class time. She discussed this conduct with the teacher who told the parent that she had not witnessed any teasing of the student during class, but would continue to watch for it and intervene if necessary. She also informed the parent policies were in place regarding teasing and that she did not allow such behavior in her class.

The parent witnessed additional teasing incidents on another two occasions. She reported these events to the teacher who replied that "she would keep an eye on [the student] and would take care of it." The teacher did not take any action regarding the teasing incidents. The parent testified that there was no evidence that her student was actually affected by the teasing and that "because he had his headphones on most of the time he was being teased ... the parent didn't know if he even heard it."

After being in school for five school days the parent removed her child from school and initiated a due process hearing without speaking with the school. Ultimately, the Court of Appeals invalidated the IEP due to the fact that the IEP Team did not include the involvement of a regular education teacher.

The parents further asserted that their student was denied a FAPE under the IDEA because the school failed to take action to prevent other students from teasing him. The parents argued that there was uncontradicted evidence in the record that the school was "deliberately indifferent" to the parent's reports that her child was being teased. The Court stated that neither the IDEA nor any court has directly addressed the question whether unremedied teasing can constitute a denial of a FAPE. However, "if a teacher is deliberately indifferent to the teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE".(emphasis added) (Citing Davis v. Monroe County Board of Education 526 U.S. 629, 633, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (holding that to violate Title IX "harassment ... [must be] so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

Here, the evidentiary record showed that by removing the student from the elementary school after only five days, the parents failed to give the school a reasonable opportunity to find a way to prevent the other students from teasing their student. The parents were found to also have failed to demonstrate that teasing resulted in the loss of an educational benefit under his IEP. They offered no evidence that the teasing affected the student or interfered with his education. In fact, the parent testified that during one of the teasing incidents, the student was "happy as a little lark." The parent also stated that during another episode "because he had his headphones on most of the time he was being teased ... [she]

didn't know if he even heard it." M.L. v. Federal Way School District 394 F.3d 634, 105 LRP 13966 (United States Court of Appeals, 9th Circuit (2005)).

- D. A student was eligible for special education services based on diagnoses including Asperger's Syndrome; reading, mathematics, and writing disorders; and a learning disorder related to auditory and visual processing. The parents rejected the school's IEP and made a unilateral private placement seeking reimbursement. A due process hearing officer ordered reimbursement for that school year. The parties settled the dispute on appeal. The school prepared a new IEP for the next school year which called for the student's transfer to a newly developed Autism Support Class (ASC) at a different high school. The IEP offered additional, individual support, including one-on-one classroom assistance, and services to ease the student's transition between schools. The parents argued, among other issues, that the ASC would expose their student to bullying. The student is susceptible to bullying because of his difficulty in social situations. Additionally, his mother observed the ASC and heard students talking to the teacher about bullying and how they should deal with bullying. The parents also pointed to his history of being bullied at the previous public school. The Court affirmed the hearing officer's conclusion that the ASC program could appropriately deal with any bullying that occurred and that this concern was only prospective. The student may face bullying, but a FAPE does not require that the school be able to prove that a student will not face future bullying at a proposed placement, as this is impossible. Therefore, the Court found that the IEP provided the student with a FAPE. J.E. v. Boyertown Area School District 57 IDELR 273 (United States Court of Appeals, 3rd Circuit (2011)). Note: This is an unpublished decision.
- E. A student with multiple disabilities was bullied and harassed by another student in elementary school. The parents alleged that the other student's presence in the middle school denied their student a FAPE. The Court held that the evidence did not establish that the student cannot receive adequate educational benefits under their IEP even if he happens to see the other student for a short time one day at school. Also, the school took reasonable measures to keep the students from having any direct contact with each other. The record simply did not support a conclusion that the school's refusal to assign the student perpetrator to a different school upon the parents demand denied the student a FAPE. A.B. v. Clarke County School District 54 IDELR 146 (United States Court of Appeals, 11th Circuit (2010)). Note: This is an unpublished decision.
- F. The parents of a student with a specific learning disability, a post traumatic stress disorder and a generalized anxiety disorder initiated a due process hearing alleging that their student was denied a FAPE due to bullying and an inappropriate reading program. The Court, in affirming the hearing

officer, held that the student was not denied a FAPE as a result of being bullied. In reaching its conclusion, the Court noted that the school took steps to eliminate a culture of harassment and bullying. Although the school could have implemented additional measures, it was not indifferent and appeared willing to take further actions. The IEP team drafted an IEP that "contained significant changes to address the social/emotional needs of the student." The IEP also provided a Behavioral Intervention Plan providing for coping skills, social skills, and self-regulating breaks. N.M. v. Central Bucks School District 62 IDELR 237 (United States District Court, Eastern District, Pennsylvania (2014)).

V. Student with a Disability as the Perpetrator

A. Role of the IEP Team Under the IDEA

If the student who engaged in the bullying behavior is a student with a disability, the IEP Team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior.

In addition, the IEP Team and other school personnel should consider examining the environment in which the bullying occurred to determine if changes to the environment are warranted. Dear Colleague Letter 61 IDELR 263 (United States Department of Education, Offices of Special Education and Rehabilitative Services and the Office of Special Education Programs (2013))

Before a student's placement is changed to a more restrictive environment, the IDEA requires that the Team **explain** why the Team made such a decision with consideration given to the use of supplementary aids and services.

B. Behavior and Disciplining Students With Disabilities

1. If the IEP Team determines, based on the evaluation, that behavior impedes the learning of the student or others, the IEP Team shall consider the use of positive behavioral interventions and supports and other strategies to address that behavior. (34 C.F.R. 300.324(a)(2)(i)).

For a child with a disability whose behavior impedes his or her learning or that of others, and for whom the IEP Team has decided that a behavior intervention plan (BIP) is appropriate, or for a child with a disability whose violation of the code of student conduct is a manifestation of the child's disability, the IEP Team "must" include a BIP in the child's IEP to address the behavioral needs of the child. Questions and Answers on Discipline Procedures, Question E-2 52 IDELR 231 (United States Department of Education, Office of Special Education and Rehabilitative Services (2009)).

2. After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required by 34 C.F.R. 300.530(d). 34 C.F.R. 300.530(b)(2))

In the case of a child with a disability who has been removed from his or her current placement for more than 10 school days in that school year, the public agency, for the remainder of the removals, must:

Provide services to the extent necessary to enable the child to appropriately participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. 34 C.F.R. 300.530(d)

3. A manifestation determination is required if the school is considering removing the child with a disability from their educational placement for more than 10 school days in a given school year when it is deemed a change in placement or placing the student in an Interim Alternative Educational Setting. 34 C.F.R. 300.530(e)

VI. Cyber Bullying

- A. A middle school student created on her home computer a spoof MySpace profile page for her principal. According to the U.S. Court of Appeals, the page contained "crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family."

The Third Circuit determined that the school district had failed to demonstrate that it could reasonably forecast that the student's spoof profile would cause substantial disruption in school. As a result, it held that the district officials' decision to suspend the student was a violation of her First Amendment right to free speech. J.S. v. Blue Mountain School District United States Court of Appeals, 3rd Circuit (2011) This was an en banc decision (all active judges participating). Petition for appeal denied by the United States Supreme Court. (2012)

- B. The Supreme Court issued a decision in a companion case to J.S. heard the same day by the Court similarly involving a high school student who created a spoof profile of his principal on MySpace. Again, the profile was disrespectful and lewd. The district, however, did not argue on appeal that the student's speech resulted in substantial disruption, but that the speech was sufficiently connected to the school campus (since the student had obtained a photo from the district's web site and accessed the profile at school) to allow the school to regulate it. Finding the connection to the school too tenuous, the Court found that Supreme Court precedent "does not allow the School District to punish Justin for expressive

conduct which occurred outside of the school context.” Layshock v. Hermitage School District, United States Court of Appeals, 3rd Circuit (2011). This was an en banc decision. Petition for appeal denied by the United States Supreme Court. (2012)

- C. A high school student created a My Space page on her home computer called "Students Against Sluts Herpes" and invited other MySpace participants from her school to join it. About two dozen students joined the group, including one who accepted his invitation on a school computer. That male posted photos of the female student who was the target of ridicule by the group. One photo was altered to show the female student with red dots on her face, to suggest that she had herpes.

The parents of the targeted female student complained to school officials, who disciplined student who authored the page. The school officials concluded that the student had created a "hate" Web site in violation of school policies against harassment, bullying, and intimidation. She was suspended from school for five days and given a "social suspension" of 90 days, meaning she was barred from certain school activities, including the cheerleading squad.

The student sued the school district and various officials, alleging that she was punished for speech that was created outside of school in violation of the First Amendment.

The Court of Appeals concluded that the school had authority under the "substantial disruption" standard established in United States Supreme Court case of Tinker v. Des Moines School District to discipline the student for speech that originated off-campus because, given the reach of the Internet, it was reasonably foreseeable that the speech would reach the school. While accepting that there are limits on the scope of school's interest in protecting students from speech that originates off-campus, the Court concluded that it need not fully define the limit here since the school's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being." Kowalski v. Berkeley County School, United States Court of Appeals, 4th Circuit (2011)). Petition for appeal denied by the United States Supreme Court. (2012)

VII. Harassment of Students With Disabilities Under Section 504

- A. An IEP Team meeting was convened to address the issue of the student's harassment based on his disability. The IEP was amended by including a self-advocacy component which stated that the student "needs to correctly identify whom to ask for help, when and how" if he experiences harassment. The IEP goal stated that "...within one day of a given situation...[the student] will approach a previously identified staff member to report the difficulty he is having and what he would like to see happen, 4/5 opportunities as measured by staff reporting." OCR found that the IEP Team involvement in addressing the student's harassment fell short of its obligation to properly respond to the allegations and

was not sufficient to meet the school's responsibility under Section 504. The school has an obligation to promptly investigate and respond to incidents of alleged harassment. In the event that harassment is found to have occurred, the school must take appropriate disciplinary and remedial action. Santa Monica-Malibu Unified School District 55 IDELR 208 (United States Department of Education, Office for Civil Rights (2010)).

Lesson Learned:

Compliance with Section 504 requirements in addressing alleged harassment based on a student's disability is not met by having the IEP Team respond to the harassment of the student. The school must investigate and take disciplinary and remedial action if necessary.

- B. OCR explained that the standards OCR uses for administrative enforcement of civil rights laws (including Section 504) are different from the liability standards established by the Courts when plaintiffs are filing private lawsuits seeking monetary damages. In contrast, the process of OCR's administrative enforcement requires OCR to make schools aware of civil rights violations and to seek voluntary corrective action to achieve compliance before pursuing fund termination or other enforcement mechanisms.

The United States Supreme Court in a case Davis v. Monroe County Board of Education (1999) held that the "harassment that is so severe, pervasive and objectively offensive" may result in monetary liability for school districts. OCR has adopted the standard that in peer harassment cases that a hostile environment is created when the conduct is sufficiently "severe, pervasive, or persistent." OCR opined that both the Court's and OCR's definitions are contextual descriptions intended to capture the same concept -- the conduct must be sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program. In determining whether harassment is actionable, OCR stated that schools should look at the "constellation of surrounding circumstances, expectations, and relationships". Dear Colleague Letter 111 LRP 32298 (United States Department of Education, Office for Civil Rights (2011)).

Based on the liability standard established by OCR, response by the IEP Team or Section 504 Team, in addition to other actions by the school, will mitigate potential school liability for alleged harassment.

- C. The parents of a student with autism who committed suicide sued the school district alleging a violation of Section 504. Numerous witnesses observed other students mistreating student in the hallways, knocking books out of his hand, telling him to "pick them up, you idiot," and kicking him when he bent down. The parents alleged that the school's failure to intervene, investigate, correct, or train their employees to adequately protect the student from bullying and harassment

was the sole or a substantial contributing cause of his decision to take his own life.

The Court dismissed the lawsuit concluding that the school district did not act with deliberate indifference. The evidence showed that the school “diligently investigated” each reported incident and, when they could identify the harasser, disciplined offenders based on the severity of the incident and the accused's disciplinary history. In some cases, the school counselor and the assistant principal held a meeting with the student and the alleged perpetrators to help the students understand the student and his disability.

An IEP meeting was held for all of the student's teachers to attend and meet with the student's parents. The IEP was amended to address parental concerns. At the IEP Team meeting the teachers were informed about the student's social misunderstandings which could impact his academic progress and discussed the need for adult monitoring. A safety plan was developed. The student was permitted to come directly to the classroom when he arrived in the morning and eat breakfast with the teacher, to sit near a teacher in the lunchroom, and to leave five minutes early to change classes. Staff testified that these accommodations were designed "to create a situation that would avoid the bullying situation and do the best to suppress Tyler from being bullied."

In addition, the Court stated that the school's failure to implement more bullying awareness programs did not support a finding of deliberate indifference. The parents' experts specifically point to the lack of teacher training, the lack of school-wide assemblies, the ineffective bullying policy, and the failure to provide specific instruction on bullying, disability harassment, and Asperger's as evidence that the school failed to effectively respond to disability harassment against the student. The Court noted that “Although the evidence clearly demonstrates that [the school] could have implemented more programs to address bullying generally and disability harassment specifically, as discussed below, the evidence shows that [the school] took affirmative steps to address bullying and disability harassment. Under those circumstances, the Court cannot find that Defendants were deliberately indifferent.” Long v. Murray County School District 61 IDELR 122 United States Court of Appeals, 11th Circuit (2013)). Note: This is an unpublished decision.

- D. A middle school student with a cognitive impairment was subjected to a series of incidents including teasing, pushing, punching, name-calling, and throwing food. Incidents of inappropriate conduct that was observed by school officials or brought to the attention of school officials was investigated. These investigations revealed that in some instances the student was the aggressor or initiator and in others he responded or mutually engaged in the behavior. At all times, appropriate action was taken depending upon the circumstances including but, not limited to, talking to the students about the situation to resolve the matter, lunch detention, after-school detention, separation of the students in the classroom, and suspension from school.

The IEP Team met and included interventions to assist the student with his education and social interaction. A safety plan was developed which included apprising the student's teachers of the student's physical and emotional concerns; adjusting the schedules of the students involved in a fight with the student to ensure the least amount of interaction time between these students; requiring the student to see the guidance counselor each morning and report any incidents or other concerns the student may have; and requiring the student to notify an administrator immediately upon any alleged harassment from other students.

The parents initiated a lawsuit under the Americans With Disabilities Act , Section 1983 and state law alleging that the student's substantive due process rights were violated by failing to protect him from "physically aggressive behavior" from other students. In dismissing the lawsuit, the Court stated that the evidence was very weak that the student was harassed because of his disability.

Further, there is no evidence that his education suffered as a result of any perceived harassment. Lastly, the school was not deliberately indifferent since the school took proactive and affirmative steps to address the inappropriate conduct directed at the student. This was not a situation where school officials were aware of a situation and did nothing. Rather, school officials took the initiative to convene an IEP Team meeting, put in place a safety plan to protect the student and continuously revised the safety plan to make sure that the student was as safe as possible during school while balancing his educational and social needs. Doe v. Big Walnut Local School District Board of Education 837 F. Supp. 2d 742, 57 IDELR 74 (United States District Court, Southern District, Ohio (2011))

- E. The parents of a student with hereditary multiple exostosis that involves multiple benign bone tumors and growths sued the school district for the alleged harassment of the student violating the Americans with Disabilities Act, the Rehabilitation Act (Section 504), Title IX of the Education Amendments of 1972, and state law claims. The alleged harassment included wishing the student happy birthday when it was not his birthday, teasing him when he said he did not plan on attending a school dance, ignoring him on a school field trip, throwing food at him, mocking his posture, and referring to him "as a lesbian, gay, or a hermaphrodite."

The Court granted the school's Motion to Dismiss concluding the facts alleged in the complaint did not suggest that the reason why the student was harassed was either his sex or his disability. Specifically, the Court stated "[T]he conduct of jerks, bullies, and persecutors is simply not actionable [under Section 504] unless they are acting because of the victim's gender (or, in this case, because of the victim's gender or disability)." Hoffman v. Saginaw Public Schools 59 IDELR 68 (United States District Court, Eastern District, Michigan (2012)).

- F. A lawsuit filed under Section 504 and the ADA is alleging that a student who is autistic was routinely harassed and bullied. The alleged harassing conduct included the use of insults which specifically referenced the perceived nature of the student's disability, such as "fucking retard" and "autistic piece of shit," as

well as objects being thrown at him, and ridicule concerning his work in class. The parents alleged that the cumulative effect of the harassment was that the student discontinued attending school, became profoundly disturbed, and was so emotionally crippled that he was unable to return to class or complete final exams. The plaintiffs also allege that the classroom teacher used profanity and shared inappropriately sexual stories and anecdotes in class.

The parents state that they e-mailed the principal concerning the harassment and were assured that the incidents would be investigated and that the teacher would be admonished. The teacher apologized shortly thereafter. The principal assured the parents that the student's one-on-one aide would attend class with him for the remainder of the semester as a deterrent to further bullying. However, according to the parents, the aide's presence had no effect on the students' continued sexual comments and insults toward the student.

In denying the school's Motion to Dismiss the lawsuit, the Court held that the parents had sufficiently stated a claim that the school acted with deliberate indifference to the harassment of the student by his peers because of his disability, and that the school's alleged conduct had the effect of denying the student access to educational opportunities. Preston v. Hilton Central School District 112 LRP 36253 (United States District Court, Western District, New York (2012))

- G. A fourth grade student with a disability locked himself in the school nurse's bathroom and took his life. The parents of the student sued the school district alleging, among other claims, that the school discriminated against him in violation of Section 504 because it was deliberately indifferent to the disability harassment suffered by the student.

The Court concluded that the school did not act with deliberate indifference. The evidence demonstrated that the school investigated reported incidents and punished the students involved. The student's teacher worked with the school psychologist and counselor to address the behavior of other students that upset the student. In addition, the school had appropriate harassment/bullying policies, provided employee training and counselors met with classes to address the issue of bullying/harassment. The Court observed that 'school districts are afforded flexibility in responding to unacceptable behavior and may tailor their responses to the circumstances'. Because the evidentiary record showed a pattern of active responses by the school, the Court granted the school's Motion for Summary Judgment on the Section 504 claim. Estate of Montana Lance v. Lewisville Independent School District 743 F.3d 982, 62 IDELR 282 (United States Court of Appeals, 5th Circuit (2014)).

- H. The parents of a tenth grade student who took her own life sued the School Board for damages claiming violations of the Americans with Disabilities Act and Section 504. The parents alleged that the school had actual notice of peer-on-peer disability harassment against their daughter but acted with deliberate indifference to the harassment. Other students teased her starting in 9th grade because of her weight and her awkward way of walking. (the student had an "obvious stance

deformity” due to Blount’s Disease and walked with an unusual gait.) The school filed a Motion for Summary Judgment.

Although the Court found that for purposes of the Motion, the student was disabled under Section 504, it concluded that the disability harassment claims should be dismissed. The parents did not submit sufficient evidence to show that the school had actual knowledge of the possibility that the student was being subjected to disability harassment. Moore v. Chilton County Board of Education 114 LRP 9864 (United States District Court, Middle District, Alabama (2014)).

VIII. Miscellaneous Issues

A. Confidentiality

1. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, restricts the nonconsensual disclosure of personally identifiable information from a student's education record, including information on disciplinary actions taken against a student.

2. A parent alleged that a school district improperly disclosed an "investigation report" which contained information directly related to the parent’s student as well as information directly related to two other students. The disclosure was to the parent of one of the other students named in the investigation report. The parent wrote to the U.S. Family Policy Compliance Office which administers the Family Educational Rights and Privacy Act (FERPA).

FERPA provides that if the education records of a minor student contain information on more than one student, the parent may inspect and review or be informed of only the specific information in the record about the student who is his or her child. The U.S. Department of Education opined “that there may be information in an education record that is directly related to two or more students and which cannot be separated easily and remain understandable to a parent. In such a case, FERPA gives each parent (for whom there is information directly related to his or her child) the right to inspect and review, or be informed of the information in the student's education records. For example, if the information in an education record is directly related to two students and cannot be separated easily, the school may permit both parents to inspect and review that part of the information in the record or the school may generally inform the parent about that part of the education record. However, FERPA would not permit a school to provide one of the parents with a copy of information in an education record that is directly related to the two students unless the other parent gave written consent for the school to do so.” Letter to Anonymous 113 LRP 35722 (United States Department of Education, Family Policy Compliance Office (2013)).

3. The parents of a student with a disability alleged that the district violated his privacy rights including FERPA by sending memos to the parents of other students regarding incidents the student was involved in.

The first memo was sent by the principal to the parents of a student who filed a harassment complaint. The memo outlined what had been done in response to the harassment complaint and indicated that matters had been investigated in accordance with district policy. It also stated that the student who was found to have engaged in harassment would lose his lunch privileges and be required to stay in the principal's office.

The principal also sent a series of memoranda to the parents of students who had claimed they had been hit or touched by student as well as other students who had reported were witnesses to the conduct of the student. The parents of the student with a disability argued that this second disclosure went not only to the parents of the children allegedly assaulted by their student, but also to the parents of children who simply witnessed the incident. The Court stated that it need not decide how a broader, yet still contemporaneous, disclosure to the parents of children witnesses, in addition to the parents of alleged victims, would affect its analysis because the memoranda simply did not disclose anything that could qualify as an education record under FERPA.

The memoranda all included the following information: (1) an incident allegedly occurred on the playground involving the student and a number of other children; (2) the student was allegedly verbally and/or physically abusive to several children during the incident; (3) each addressee's child had been questioned about the incident and each reported the student had been abusive in some manner; (4) the student was informed that if he had been abusive, he must stop such behavior immediately; and (5) the student was warned that there were consequences for abusive behavior. The Court observed that "As should be apparent, the memoranda identified in the complaint disclosed no more than the fact that the addressee's child had been involved in an alleged incident involving [the student], either as a victim or witness, and that the addressee's child had been questioned about the incident. The memoranda do not disclose whether [the student] was ultimately found to be at fault, whether he was punished, or, if so, what that punishment was. The Plaintiffs have not identified, and this court has not found, a single case holding that the extremely limited type of information conveyed here constitutes an education record" under FERPA.

The Court held that "contemporaneous disclosure to the parents of a victimized child of the results of any investigation and resulting disciplinary actions taken" does not constitute a release of an "education record" under FERPA. The Court further noted that "Reading such disclosures to fall within the ambit of [FERPA] would place educators in an untenable position: they could not adequately convey to the parents of

affected students that adequate steps were being undertaken to assure the safety of the student.” Jensen v. Reeves, 246 F.3d 681, 34 IDELR 31 (United States Court of Appeals, 10th Circuit (2001)). Note: Although the United States Supreme Court held that FERPA does not provide for a private right of action allowing a parent or student to sue the school for an alleged violation of the law. Gonzaga University v. Doe 536 U.S. 273 (United States Supreme Court (2002)) both the IDEA and Section 504 also have provisions that protect the confidentiality of education records.

Appendix A

Effective Evidence-Based Practices for Preventing and Addressing Bullying

(Source: United States Office of Special Education and Rehabilitative Services and
Office of Special Education Programs (August 20, 2013))

There is no one-size-fits-all or simple solution for addressing bullying behavior. Rather, efforts to prevent and address bullying behavior should be embedded within a comprehensive, multitiered behavioral framework used to establish a positive school environment, set high academic and behavioral expectations for all students, and guide delivery of evidence-based instruction and interventions that address the needs of students, including students with disabilities. In such a framework, policies and practices would be aligned and consistently implemented school wide; that is, across general and special education, each grade level, and in all school settings and activities. Data-based decision making would be used to identify needs, analyze problem situations, outline clear evidence-based practices to be used in delivery of instruction and implementation of interventions, and monitor progress toward clear, positive academic and behavioral outcomes as part of an ongoing, continuous improvement model.

When deciding which strategy or strategies to use to address bullying behavior, each school needs to consider the relevant factors given its school environment, students' social and cognitive development, and the evidence on programmatic prevention and intervention. Teachers, administrators, and staff understand that students' social behavior affects their academic learning. In many high-performing schools, academic instruction is combined with effective behavioral supports to maximize academic engagement and in turn, student achievement. That is, successful schools focus on decreasing academic failure and problem behaviors, including bullying, and increasing opportunities for all students to fully participate in learning. There is a growing body of research on promising school bullying interventions that can inform practice. For example, a meta-analysis of research across a 25-year period found that school bullying prevention programs led to changes in knowledge, attitudes, and self-perceptions of those targeted by bullying, engaging in bullying, and bystanders.¹ Another meta-analysis of school-based programs implemented in the United States and internationally to reduce bullying concluded that overall school-based antibullying programs were often effective in reducing bullying, and identified program elements (i.e., critical practices or strategies) associated with effective programs; but results varied based on context.² Experimental research has also demonstrated lower rates of bullying and peer rejection when critical practices or strategies were used within a multitiered behavioral framework.³

The following effective evidence-based practices are found in many multitiered behavioral frameworks. We encourage you to carefully consider each of these practices as part of any bullying prevention and intervention program you undertake to help ensure that your school and classroom settings are positive, safe, and nurturing environments for all children and adults.

Use a Comprehensive Multitiered Behavioral Framework

Just as important as determining which strategies will be used is knowing how, when, and by whom those strategies will be implemented. Evidence-based instructional and intervention strategies for preventing and addressing bullying of students, including students with disabilities, are most effective when used as part of a comprehensive multitiered behavioral framework that engages the whole school community, and establishes and maintains positive, safe, and nurturing school environments conducive to learning for all students. Providing clear and formal instruction for all students, and staff on how to behave in respectful and responsible ways across all school settings and activities is a vital component of this approach.

Issues related to the bullying of students with disabilities should be included in the topics addressed by the school's comprehensive multitiered behavioral framework, and also as a specific area of focus in policies and practices addressing behavioral expectations. In addition to implementing certain steps for the whole school (e.g., consistent rules and rewards for good behavior), a comprehensive multitiered behavioral framework of instruction and interventions also includes using strategies that address bullying and other problematic behaviors, such as steps for groups of students exhibiting at-risk behavior and individual services for students who continue to exhibit troubling behavior.

Using a comprehensive multitiered behavioral framework for making decisions on identifying, implementing, and evaluating effective evidence-based practices helps schools to: (a) organize evidence-based practices, including those that will be used to address bullying of students with disabilities; (b) support the use of evidence-based practices according to the practice guidelines; and (c) monitor the outcomes for students to determine the effectiveness of the evidence-based practices and need for any additional instruction and intervention. Preventing and addressing bullying of students with disabilities needs to be aligned with, and embedded as part of each school's comprehensive multitiered behavioral planning, and given explicit consideration to ensure that the individual needs of each student with a disability are addressed fully in the school-wide plans for creating and sustaining a positive, safe, and nurturing school environment.

One example of a multitiered behavior framework that school personnel can use to plan, implement, and evaluate evidence-based instruction and intervention practices is Positive Behavioral Interventions and Supports (PBIS). The PBIS framework can help to create an appropriate social culture, learning and teaching environment, achieve academic and social success, and minimize problem behavior, including reducing the risks and decreasing the occurrence of bullying. Using this multitiered framework, school personnel establish a continuum of evidence-based behavioral practices that include school-wide strategies, more intense strategies for groups of students exhibiting at-risk behaviors, and individual services for students who continue to exhibit problematic behavior and need additional support.⁴ Rather than offering a packaged curriculum, a manualized strategy, or a prescribed intervention, PBIS provides school personnel with a decision-making structure that they can use to identify, implement, and evaluate effective evidence-based instruction and intervention strategies within a comprehensive multitiered framework to prevent and respond to bullying in their school setting.⁵ By outlining a comprehensive school-wide approach with multitiered instruction and intervention, schools work to create school cultures that prevent the development and reduce the

occurrence of bullying. In addition, schools are prepared to respond to problematic behavior using a team-based, data-driven problem-solving process when needed.

The following are practices found in many effective, evidence-based behavioral prevention and intervention school-wide frameworks.

Teach Appropriate Behaviors and How to Respond

Preventing bullying begins by actively and formally teaching all students and all school personnel: (1) what behaviors are expected at school and during school activities; (2) what bullying looks like; and (3) how to appropriately respond to any bullying that does occur. Specifically, clear behavioral expectations are taught to students and adults in the same manner as any core curriculum subject.⁶ Consistency in behavioral expectations from class to class, adult to adult, and across settings is very important in establishing shared and predictable expectations that both students and school personnel understand and follow.

Provide Active Adult Supervision

Adults play an important role in actively supervising and intervening early to correct behavior problems, especially in common areas (e.g., hallways, cafeteria, playgrounds, and extracurricular events). By moving continuously throughout an area and having positive interactions with students, adults are able to teach and model expected behavior and routines, notice and reward appropriate behavior, and intervene early so that minor rule violations are handled effectively before problematic behaviors escalate.

Train and Provide Ongoing Support for Staff and Students

Training, ongoing professional development, and support, including coaching, to all personnel on the use of effective evidence-based strategies for responding to inappropriate behavior, including bullying, as well as evidence-based instruction and classroom management practices, are important tools to ensure that school staff are equipped to effectively address bullying. In addition, clear guidance on legal requirements, policy, and practice implications for students with disabilities needs to be explicitly provided in training.

School personnel need to be aware that students with disabilities are significantly more likely than their peers without disabilities to be the targets of bullying.⁷ Any number of factors may explain their increased risk of being bullied, including but not limited to the student's physical characteristics, processing and social skills, or simply being in environments with others who are intolerant.⁸

Training is essential in helping school personnel recognize the different forms of bullying that may be directed at students with disabilities, and the unique vulnerabilities these students may have to social isolation, manipulation, conditional friendships, and exploitive behaviors. Students, with and without disabilities, do not always recognize problem behaviors as bullying, or may be reluctant to stand up for themselves or others, seek help, or report bullying due to fear

of retaliation, particularly if adults are involved. Due to the complexities of their disabilities, students with intellectual, communication, processing, or emotional disabilities may not understand manipulation or exploitive behavior as harmful, or have the knowledge and skills to explain the situation to an adult who can help.

All students should receive clear, explicit instruction on how to respond to and report bullying. For students with disabilities, instruction on how to respond to and report bullying needs to be provided in a manner consistent with their IEPs and any accommodations that are provided to support learning. In addition, school staff should monitor for bullying and its possible effects on FAPE for students with disabilities, as it is not sufficient for school personnel to rely only on students to report bullying or identify how the bullying is interfering with FAPE.

Develop and Implement Clear Policies to Address Bullying

We encourage schools to develop clear policies and procedures, consistent with Federal, State, and local laws, to prevent and appropriately address bullying of students, including students with disabilities.⁹ In these antibullying policies, schools may want to include a reminder that harassment against a student on the basis of disability and retaliation against any student or other person are also prohibited under Section 504, Title II, and other Federal civil rights laws enforced by the U.S. Department of Education's Office for Civil Rights.¹⁰

Schools should widely disseminate their antibullying policies and procedures to staff, parents, and students, and post the policies in the school and on the school's website. Any published policies and procedures must be accessible to students with visual or other disabilities. Schools should provide ongoing training to staff, parents, and students on their antibullying policies and procedures so that everyone in the school community is aware that bullying behavior will not be tolerated.

When bullying occurs, school personnel need to respond quickly, to act in accordance with school policies and procedures, and to address the issue in a professional manner. School personnel should be sure to document the response to a bullying incident in writing.

Monitor and Track Bullying Behaviors

Collecting and analyzing data on bullying behaviors can provide a clearer picture of what is happening in school and school activities, guide planning of prevention, instruction, and intervention efforts, and inform decision making on the effectiveness of current policies and practices over time. Adults tend to underestimate the rates of bullying because students rarely report it, and it often happens when adults are not around.¹¹ Thus, data collected from multiple sources, including surveys of students, will help establish a more accurate understanding of bullying behaviors occurring in school and school activities. Data collection should be linked to existing data systems (e.g., attendance, discipline) when possible, and include information such as the frequency, types, and location of bullying behavior, other contextual factors, adult and peer responses, and also perceptions of safety and school climate.

Notify Parents When Bullying Occurs

Parents or guardians should be promptly notified of any report of bullying that directly relates to their child in accordance with Federal, State, and local law, policies, and procedures. Clear and accurate communication is needed to inform the parents or guardians of both the student who was the target of bullying behavior and the student who engaged in the bullying behavior.¹² Parents and guardians should also be encouraged to work with their child's teachers and other school personnel to determine the steps that need to be taken to address the bullying and prevent its recurrence.

Address Ongoing Concerns

Expected school behaviors and routines should be taught to and known by all students and staff. Students whose school behavior is not safe, responsible, and respectable, and consistent with the established school expectations may need: (a) more focused social skills instruction; (b) frequent, specific feedback on their behavior, or (c) increased adult engagement.¹³ School personnel should use data measuring an individual student's responsiveness to antibullying instruction and intervention to determine the need for continued, more intensive, and specialized assistance for each student.

Additionally, if a school suspects that bullying is becoming a problem school-wide, a team-based and data-driven problem-solving process should be initiated. Such an approach should examine discipline and performance data to determine: (1) the current status of bullying, including how often, when, and where specific bullying incidents occur, how many and which students are involved, including whether any are students with disabilities, and which adults, if any, are involved; (2) the extent to which positive school-wide behavioral expectations have been explicitly taught, as well as the extent to which students easily and naturally meet those expectations by routinely behaving in a manner consistent with the expectations at school and school activities; and (3) whether all students are actively academically engaged, successful, and appropriately challenged. Based on the data, a common strategy should be outlined to address the settings (e.g., hallways, cafeterias, and buses) and situations (e.g., unstructured class time, transitions, field trips, and during assemblies) in which bullying frequently occurs. The strategy should include certain steps that will be taken for the whole school (e.g., consistent rules and rewards for good behavior), more intense steps that will be taken for groups of students exhibiting at-risk behavior, and individual services that will be provided for students who continue to exhibit problematic behavior.

Sustain Bullying Prevention Efforts Over Time

Prevention of bullying should be ongoing, and accepted as an integral component of the school's overall behavioral framework that delineates a school's environment and routine operation. We must remain mindful of the importance of providing positive, safe, and nurturing environments in which all children can learn, develop, and participate. Just as each year schools work to maximize academic engagement and learning outcomes for all students, including students with disabilities, we also must take steps to prevent and address bullying behavior. Effective,

evidence-based practices created and sustained within a comprehensive multitiered framework will prevent the occurrence and reduce the impact of bullying in our schools, and also enhance learning and developmental outcomes for all students.

Resources on Preventing and Addressing Bullying

Additional information about preventing and addressing bullying behavior is available from the resources listed below.

- StopBullying.gov -- This U.S. government website is hosted by the U.S. Department of Health and Human Services in partnership with the U.S. Department of Education. It provides information on how kids, teens, young adults, parents, educators, and others in the community can address bullying behaviors. Information about cyberbullying also is available. <http://www.stopbullying.gov>

- PACER.org/bullying/ -- This National Parent Center funded by the Office of Special Education Programs (OSEP) supports families with children with disabilities by providing assistance to individual families, conducting workshops, and providing information through materials and websites. PACER's National Bullying Prevention Center educates communities nationwide to address bullying through creative, relevant, and interactive resources. PACER's bullying prevention resources are designed to benefit all students, including students with disabilities. PACER also hosts TeensAgainstBullying.org, created by and for teens to address bullying. In addition, PACER hosts KidsAgainstBullying.org, designed by and for elementary school students to learn about bullying prevention. <http://www.pacer.org/bullying/>

- PBIS.org -- The Technical Assistance Center on Positive Behavioral Interventions and Supports (PBIS), funded by OSEP, gives schools capacity-building information and technical assistance for identifying, adapting, and sustaining effective school-wide disciplinary practices. It also: (a) provides technical assistance to encourage large-scale implementation of PBIS; (b) provides the organizational models, demonstrations, dissemination, and evaluation tools needed to implement PBIS with greater depth and fidelity across an extended array of contexts; and (c) extends the lessons learned from PBIS implementation to the broader agenda of educational reform. <http://www.pbis.org>

- NICHCY.org -- This national dissemination center funded by OSEP provides a wealth of information on disabilities in children and youth; programs and services available for infants, toddlers, children, and youth with disabilities under IDEA; and research-based information on effective practices for children with disabilities (birth through 21 years of age). Information and links to resources that address bullying relative to children with disabilities are also provided. <http://nichcy.org/schoolage/behavior/bullying/>

- FindYouthInfo.gov -- This U.S. government website was developed by 12 Federal agencies, including the Department of Education, in partnership with the White House, to disseminate information and to leverage resources to support programs and services focusing on positive, healthy outcomes for youth. The website provides facts and information on a wide range of

topics including bullying, cyberbullying, and positive youth development. It also contains information on assessing community assets, generating maps of local and Federal resources, searching for evidence-based youth programs, and keeping up-to-date on the latest, youth-related news. Information is provided on funding opportunities available to those interested in addressing bullying and related topics, as well as on Federal funds awarded to states and communities for use in locating potential resources or partners already available. <http://www.FindYouthInfo.gov/>

- Safesupportiveschools.ed.gov -- The National Center on Safe Supportive Learning Environments is funded by the U.S. Department of Education's Office of Safe and Healthy Students, and the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration (SAMHSA) to help schools and communities contend with many factors that impact the conditions for learning, such as bullying, harassment, violence, and substance abuse. The Center provides resources, training, and technical assistance for State and local educational agency administrators, teachers, and staff; institutions of higher education; communities, families, and students seeking to improve schools' conditions for learning through measurement and program implementation, so that all students have the opportunity to realize academic success in safe and supportive environments.

¹Merrell, K. W., Gueldner, B. A., Ross, S. W., & Isava, D. M. (2008). How effective are school bullying intervention programs? Meta-analysis of intervention research. *School Psychology Quarterly*, 23, 26-42.

²Farrington, D. P., & Ttofi, M. M. (2009). School-based programs to reduce bullying and victimization. *Campbell Systemic Reviews*, 2009:6.

³Bradshaw, C. P., Mitchell, M. M., & Leaf, P. J. (2010). Examining the effects of school-wide Positive Behavioral Interventions and Supports on student outcomes: Results from a randomized controlled effectiveness trial in elementary schools. *Journal of Positive Behavior Interventions*, 12, 133-148.

⁴Bradshaw et al. (2010).

⁵Sugai, G., Horner, R.H., Algozzine, R., Barrett, S., Lewis, T., Anderson, C., Bradley, R., Choi, J. H., Dunlap, G., Eber, L., George, H., Kincaid, D., McCart, A., Nelson, M., Newcomer, L., Putnam, R., Riffel, L., Rovins, M., Sailor, W., & Simonsen, B. (2010). *School-Wide Positive Behavior Support: Implementers' Blueprint and Self-Assessment*. Eugene, OR: University of Oregon.

⁶Sugai et al. (2010).

⁷Young, J., Ne'eman, A., & Gelser, S. (2011). *Bullying and Students with Disabilities*. A Briefing Paper from the National Council on Disability. Washington, DC: National Council on Disability (available at: <http://www.ncd.gov/publications/2011/March92011>).

⁸Young et al. (2011).

⁹Under Title II and Section 504, school districts must notify students, parents, and school personnel (including persons with impaired vision or hearing) that the district does not discriminate on the basis of disability; must adopt grievance procedures providing for the prompt and equitable resolution of complaints alleging disability discrimination (including harassment); and must designate at least one person to coordinate compliance with those laws. See 28 C.F.R. § 35.106; 28 C.F.R. § 35.107; 34 C.F.R. § 104.7; 34 C.F.R. § 104.8.

¹⁰It is unlawful to retaliate against an individual for the purpose of interfering with any right or privilege secured by Section 504, Title II, Title VI of the Civil Rights Act of 1964 (Title VI), Title IX of the Education Amendments of 1972 (Title IX), the Age Discrimination Act of 1975 (Age Act), or the Boy Scouts of America Equal Access Act (BSA Act). See 34 C.F.R. § 100.7(e) (Title VI); 34 C.F.R. § 104.61 (Section 504) (incorporating 34 C.F.R. § 100.7(e) by reference); 28 C.F.R. § 35.134 (Title II); 34 C.F.R. § 106.71 (Title IX) (incorporating 34 C.F.R. § 100.7(e) by reference); 34 C.F.R. § 110.34 (Age Act); and 34 C.F.R. § 108.9 (BSA Act) (incorporating 34 C.F.R. § 100.7(e) by reference).

¹¹Cohen et al. (2009).

¹²The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, restricts the nonconsensual disclosure of personally identifiable information from a student's education record, including information on disciplinary actions taken against a student. State and local officials are encouraged to seek guidance to be sure that all policies are implemented consistent with these provisions.

¹³Sugai et al. (2010).

Appendix B

Arizona Statute on Bullying (ARS 15-341(A)(37))

The governing board shall:

Prescribe and enforce policies and procedures to prohibit pupils from harassing, intimidating and bullying other pupils on school grounds, on school property, on school buses, at school bus stops, at school sponsored events and activities and through the use of electronic technology or electronic communication on school computers, networks, forums and mailing lists that include the following components:

- (a) A procedure for pupils, parents and school district employees to confidentially report to school officials incidents of harassment, intimidation or bullying. The school shall make available written forms designed to provide a full and detailed description of the incident and any other relevant information about the incident.
- (b) A requirement that school district employees report in writing suspected incidents of harassment, intimidation or bullying to the appropriate school official and a description of appropriate disciplinary procedures for employees who fail to report suspected incidents that are known to the employee.
- (c) A requirement that, at the beginning of each school year, school officials provide all pupils with a written copy of the rights, protections and support services available to a pupil who is an alleged victim of an incident reported pursuant to this paragraph.
- (d) If an incident is reported pursuant to this paragraph, a requirement that school officials provide a pupil who is an alleged victim of the incident with a written copy of the rights, protections and support services available to that pupil.
- (e) A formal process for the documentation of reported incidents of harassment, intimidation or bullying and for the confidentiality, maintenance and disposition of this documentation. School districts shall maintain documentation of all incidents reported pursuant to this paragraph for at least six years. The school shall not use that documentation to impose disciplinary action unless the appropriate school official has investigated and determined that the reported incidents of harassment, intimidation or bullying occurred. If a school provides documentation of reported incidents to persons other than school officials or law enforcement, all individually identifiable information shall be redacted.
- (f) A formal process for the investigation by the appropriate school officials of suspected incidents of harassment, intimidation or bullying, including procedures for notifying the alleged victim on completion and disposition of the investigation.
- (g) Disciplinary procedures for pupils who have admitted or been found to have committed incidents of harassment, intimidation or bullying.

(h) A procedure that sets forth consequences for submitting false reports of incidents of harassment, intimidation or bullying.

(i) Procedures designed to protect the health and safety of pupils who are physically harmed as the result of incidents of harassment, intimidation and bullying, including, if appropriate, procedures to contact emergency medical services or law enforcement agencies, or both.

(j) Definitions of harassment, intimidation and bullying.

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.